United States Postal Service, Employer-Petitioner *and* American Postal Workers Union, AFL-CIO. Case 5–UC–386

August 31, 2006

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 30, 2003, the Regional Director for Region 5 issued a Decision and Order dismissing the Employer's unit clarification petition, finding that under *Verizon Information Systems*, 335 NLRB 558 (2001), the Employer was estopped from filing the petition. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision and Order. On December 24, 2003, a three-member panel of the Board[1] granted the Employer's request for review.

Having carefully considered the matter, we find, contrary to the Regional Director, that the Employer is not estopped from filing the petition. Accordingly, we reinstate the petition and remand this case to the Regional Director.

The Employer and the Union are parties to a collective-bargaining agreement that recognizes the Union as the collective-bargaining representative for a nationwide unit of various groups of employees, including postal clerks. On October 27, 1997, the Union filed a unit clarification petition in Case 5–UC–353, seeking to include approximately 250 Executive and Administrative Service (EAS) classifications of employees in the bargaining unit. On December 13, 1999, the Employer and the Union signed a settlement agreement to "fully and completely resolve any and all issues, and all currently pending grievances" regarding the Union's unit clarification petition. Under the settlement agreement, the Union agreed to withdraw its petition, and the parties agreed to arbitrate various EAS classifications in dispute, including the "Address Management Systems Specialists." The agreement was silent regarding the rights and obligations of the parties in the event that either of the parties disagreed with the results of the arbitration, including whether any party could file a unit clarification petition with the Board.

Pursuant to the settlement agreement, the parties submitted to arbitration the issue of whether the Address Management System Specialists should be included in the unit. The arbitrator issued an award on April 29, 2003, finding that the classification "is part of the APWU bargaining unit and that it is a violation of Article 1.2 of the National Agreement to exclude the position and the disputed work from the bargaining unit." The Employer then filed the instant petition seeking to exclude from the bargaining unit "all EAS personnel not historically represented by any postal union, including but not limited to the Address Management System Specialists."

In dismissing the petition, the Regional Director relied on the Board's decision in *Verizon Information Systems*, supra. The Regional Director found that, like the union in *Verizon*, the Employer was estopped from filing the petition. The Regional Director emphasized that the Union and the Employer reached an enforceable agreement establishing a procedure to resolve the issue of the EAS employees, including the Address Management Systems Specialists, outside of the Board's processes. In light of this agreement, the Regional Director found that processing the petition would permit the Employer to enjoy the benefits of the settlement agreement while avoiding its commitment to resolve the status of the EAS positions through a procedure outside of the Board's processes. Moreover, it would permit the Employer to file a petition after every unfavorable arbitrator's award involving the various EAS positions.[2] The Regional Director also emphasized that the Union detrimentally relied on the Employer's promise to arbitrate because the Union withdrew its unit clarification petition as part of the settlement agreement.

Contrary to the Regional Director, we do not find that the Board's decision in *Verizon*, supra, is dispositive. In *Verizon*, the union and the employer agreed to a procedure for voluntary recognition outside the Board's processes, including a provision to have unit issues decided by an arbitrator. The union invoked the provisions of the agreement. In response to the union's invocation of the agreement and consistent with the agreement's terms, Verizon, at the union's request, disclosed information about the employees. The union also invoked its right under the agreement to have the issue of unit scope decided by an arbitrator and the issue was submitted for resolution by an arbitrator before the American Arbitration Association. However, the union subsequently sought to abandon the arbitration by filing a representation petition with the Board. Verizon filed a motion to dismiss the petition. The Regional Director denied the motion. While expressly affirming its "long-held view, relied upon by the Regional Director, that it only infrequently defers to arbitration in representation proceedings," the Board—in what it described as a "narrow holding"—held that the union was estopped from filing a petition with the Board. The Board premised its holding

[1] Chairman Battista, Member Liebman, and Member Walsh.

[2] The Address Management System Specialist was one of six classifications of EAS personnel that the parties agreed to take to arbitration under the settlement agreement.

on the fact that the union invoked the benefits of the agreement, and then sought to abandon the agreement. The Board held that the union could not "pick and choose which provisions it wishes to invoke and which it prefers to avoid." 335 NLRB at 560.

In contrast, the Employer here, unlike the union in *Verizon*, carried out its obligations under the settlement agreement. It completed the arbitration process. We recognize that the Employer did not then acquiesce to the arbitral decision. Instead, it has filed the instant petition with the Board. However, as noted above, there was no express agreement that the Employer would refrain from exercising its right to file a petition with the Board.[3] Thus, the Employer did not breach the agreement.[4]

Our dissenting colleague says that the Union's withdrawal of its own petition and the parties' agreement to go to arbitration as to the issues raised in that petition somehow constitute an agreement by the Employer not to file its own petition. Where, as here, the right involved is the statutory right of access to the Board, we would not lightly infer an agreement to forgo that right. If the parties had intended the result for which our colleague contends, they could easily have provided that the Employer agrees not to raise the issues before the Board. The parties did not do so.

Finally, this is not a challenge to the arbitrator's authority. The arbitrator apparently had authority to issue his opinion, and he did. Rather, the issue here is the Board's power to exercise its jurisdiction. We would do so.

Accordingly, we find that the Regional Director erred in dismissing the Employer's petition. We therefore reinstate the petition and remand the case to the Regional Director for further appropriate action.[5]

[3] Existing Board law holds that any waiver of a statutory right must be "clear and unmistakable". In the absence of language in the settlement agreement limiting the Employer's right to file a petition with the Board, we find that the Employer has not clearly and unmistakably waived its right to do so.

[4] Contrary to the dissent, the settlement agreement does not "implicitly" preclude the Employer from exercising its statutory right to the file the instant petition. The dissent infers from the agreement that the parties' "obvious intent" was to make the arbitration proceeding "final and binding." Not all arbitral decisions are final and binding however, and this agreement did not contain a provision making the decision final and binding. *Champlin Petroleum Co.*, 201 NLRB 83, 90 (1973), cited in support of the dissent's approach, is not on point. The issue presented in *Champlin* was whether the Board should defer the case to the parties' contractual arbitral procedure pursuant to the Board's deferral policy under *Collyer Insulated Wire*, 192 NLRB 837 (1971). Under a *Collyer* deferral, the Board retains jurisdiction to review the arbitral award. By contrast, the issue in the instant case is whether a party has given up the right to file its own petition and come to the Board at all.

[5] In its request for review, the Employer contends that deferral to the arbitrator's award is not appropriate because issues in this case turn on statutory policy and not solely upon contract interpretation. We acknowledge this as controlling Board law. However, because this issue was not before the Regional Director, we find no need to pass on it.

ORDER

The Regional Director's dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action consistent with this Decision on Review.

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Contrary to the majority's view, this case is governed by our decision in *Verizon Information Systems*, 335 NLRB 558 (2001), which dismissed a union's election petition on estoppel grounds and required the union to honor the terms of a voluntary-recognition agreement that it had already invoked, to its benefit.

Here, the Employer and the Union agreed to resolve "fully and completely and all issues" regarding the Union's unit-clarification petition by arbitrating whether certain job classifications should be included in the bargaining unit. When the Employer lost the first arbitration under the agreement, it filed its own unit-clarification petition with the Board. Applying *Verizon*, the Regional Director properly dismissed that petition, based on the parties' arbitration agreement, which the Employer had first invoked and then abandoned.

The majority attempts to distinguish *Verizon* by arguing that because the Employer "completed the arbitration process," it "carried out its obligations under the [arbitration] agreement." "[T]here was no express agreement that the Employer would refrain from exercising its right to file a petition with the Board," the majority insists, citing the principle that the waiver of a statutory right must be clear and unmistakable.

But the majority's approach is untenable. The obvious intent of the parties was to make the arbitration proceeding final and binding, which implicitly precludes the filing of a petition with the Board. By its terms, the arbitration agreement "represents an understanding between the parties to fully and completely resolve any and all issues, and all currently pending grievances regarding the [Union's] Unit Clarification petition." Insofar as the *Employer's* current petition involves the same issues as the Union's earlier petition, they, too, are necessarily covered by the arbitration agreement. Indeed, the agreement contemplates that the anticipated arbitration awards

would establish controlling precedent.[1] To the extent the waiver standard might apply (contrary to *Verizon*), it was satisfied.[2]

The majority points to no language in the agreement suggesting that arbitration was non-binding or that the parties reserved their right to petition the Board. Nor does the majority explain *why* the Union would agree to dismiss its own unit-clarification petition and arbitrate the issues raised—incurring expense and delay— only to permit the Employer to opt-out of an unfavorable arbitration award and return the matter to the Board. As the Board has observed, even when there is no specific language to the effect that the results of arbitration shall be final and binding, it is reasonable to infer that this was the intention of the parties. Otherwise, the arbitral procedure would be illusory; and resort thereto, an exercise in futility. *Champlin Petroleum Co.*, 201 NLRB 83, 90 (1973) (deferring case to arbitration). In short, as construed by the majority, the arbitration agreement makes no sense.

Applying *Verizon* here, finally, is consistent with general federal labor law. It is well established that a party may not voluntarily arbitrate a matter, lose, and only then challenge the arbitrator's authority, even if the issue arbitrated is a question of external law that would ordinarily be decided by a court or other tribunal. See, e.g., *Jones Dairy Farm v. Local P-1236, United Food & Commercial Workers*, 760 F.2d 173, 175–176 (7th Cir. 1985).[3]

The Employer had its bite of the apple. Accordingly, I would affirm the Regional Director's dismissal of the petition.

Dated, Washington, D.C. August 31, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[1] The agreement provides that the "parties *shall apply* the national level arbitration awards which are issued as a result of this settlement agreement as broadly as possible in an effort to resolve other pending EAS grievances raising the same or similar issues or arguments" (emphasis added).

[2] The *Verizon* Board explained that in situations like this one, a waiver analysis is inapplicable:

> The issue is not . . . whether the Petitioner "clearly and unmistakably" waived its right to file a representation petition. Rather, the issue is whether the Petitioner – having elected to proceed under the Agreement and derived benefits from it – should be permitted to pick and choose which provisions it wishes to invoke and which it prefers to avoid. The question, then, is really one of estoppel.

335 NLRB at 560.

[3] See also *United Industrial Workers v. Virgin Islands*, 987 F.2d 162, 167–169 (3d Cir. 1993) (rejecting union's post-arbitration argument that arbitrator lacked authority to determine whether public employee was included in bargaining unit and that territorial public employees relations board had exclusive jurisdiction).